IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

NAVAJO MEDICINEMEN'S ASSOCIATION, et al., Petitioner,	)	No. 83-669
v.	)	
JOHN R. BLOCK, et al., Respondent.	)	
AND RELATED CASES.	)	

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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THE INTEREST OF AMICUS CURIAE

The State of California and its Native American Heritage Commission have a continuing interest in protecting the right to practice American Indian religion. (Cal. Const., Art. I, § 4; Cal. Pub. Res. Code, §§ 5097.9-5097.99.) A recurring issue in this context is the conflict between land development projects and the Indian religious need to protect sacred sites from disturbance. The State of California recently obtained a judgment enjoining two Forest Service land-use projects because they would impose a burden on the traditional religious practices of three California Indian tribes. (California v. Block, 565 F.Supp. 586 (1983).) The Court of Appeals' opinion in the instant case, Wilson v. Block, 708 F.2d 735 (1983) will adversely affect the ability to protect sacred sites on public land.

SUMMARY OF ARGUMENT

The court below set an unconstitutional standard for showing that a federal land-use project imposes a burden on Indian religious practices. Although this Court held in Wisconsin v. Yoder, 406 U.S. 205 (1970) that actions and beliefs cannot be separated into "logic-tight compartments" for analyzing First Amendment claims of religious burden, the Court of Appeals in the instant case ruled that a federal land-use project does not impose a burden unless it makes a religious practice physically impossible; it is immaterial that the project's impact on religious belief will destroy the practice. The justification proffered for this restrictive standard was a purported need to protect governmental interests in land management. Government interests, however, do not touch on the issue whether a burden has been imposed on religion. Rather, they become

relevant only after the existence of a burden has been shown, when they must be scrutinized to see if they are of compelling importance to justify the burden's imposition. Here, the court avoided even looking at what importance, if any, the development project might have to government interests.

I. The Court Of Appeals Applied An Impermissibly Narrow Test Of Whether A Burden Had Been Imposed On The Hopi And Navajo Tribal Religions.

In the traditional religions of the Navajo and Hopi Indian tribes of Arizona, the San Francisco Peaks constitute the body of one Navajo god -- with its topographic features forming various parts of the body -- and the dwelling place of other Navajo gods and of Hopi gods. In both traditions, religious ceremonies must be performed at the Peaks. The Court of Appeals wrongly held that desecration of the Peaks, through development of ski facilities on part of

them, did not impose a constitutionally cognizable burden on the tribal religions.

The court arrived at its erroneous holding by applying an unconstitutionally narrow test of the kind of burden against which the First Amendment protects, arriving at this test by a reductionist analysis. The first step of the analysis was to strictly dichotomize religious belief and religious practice and to reject categorically that a government land use which defiles a sacred area could ever be constitutionally recognized as burdening religious beliefs. Next, the court held that the Constitution will only recognize a land use as burdening religious practice when the particular portion of the sacred site defiled by the land use is separately and distinctly indispensible, which in turn can only be shown by demonstrating that it is the only portion of the sacred site where certain religious ceremonies can be

performed. The court found that since the tribes had contented themselves with proving that the San Francisco Peaks as a whole were indispensible to their religious practices, and the record failed to provide evidence whether there were ceremonies which could be conducted nowhere on the Peaks but in the ski bowl, the Indian believers had failed to meet their burden of proof.

It is submitted that the Court of Appeals' test for when government land management will be judged to constitute a burden on free religious exercise distorts religious reality and understates the breadth of First Amendment protection as interpreted by this Court. We will examine the faulty analysis wnich lead to the faulty test.

The first distorting and reductionist step in the court's analysis was to conceptually sever the project's effect on beliefs from its effect on practices. As this Court

has recognized, however, "belief and action cannot be neatly confined in logic-tight compartments." (Wisconsin v. Yoder, supra, 406 U.S. at 220.)

The testimony of a tribal leader, quoted by the Court of Appeals in its opinion, explains how the ski development's impact on belief will undermine and eventually lead to the destruction of the practices as well as the culture:

> "It is my opinion that in the long run if the expansion is permitted, we will not be able successfully to teach our people that this is a sacred place. If the ski resort remains or is expanded, our people will not accept the view that this is the sacred Home of the Kachinas. The basis of our existence as a society will become a mere fairy tale to our people. If our people no longer possess this long-held belief and way of life, which will inevitably occur with the continued presence of the ski resort . . . a direct and negative impact upon our religious practices [will result]. The destruction of these practices will also destroy our present way of life and culture." (Testimony of Abbott Sekaquaptewa, 708 F.2d at 740-741, fn. 2.)

Mr. Sekaquaptewa's testimony strongly parallels the opinion testimony this Court relied on in finding that a religious burden had been imposed in the case of Wisconsin v. Yoder, supra, 406 U.S. at 212. There it was testified that exposing Amish children to "worldly values" through secondary education "could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also . . . ultimately result in the destruction of the old Order Amish church community as it exists in the United States today."

In analyzing the connection between beliefs and practices presented by the Yoder evidence, this court reasoned as follows:

> "Nor is the impact of the [government action] confined to grave interference with important . . . religious tenets from a subjective point of view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record

> shows, [the government action] carries with it a very real threat of undermining the . . . community and religious practices as they exist today; they must either abandon belief . . . or be forced to migrate to some other and more tolerant region." (406 U.S. at 218.)

The same connection obtains in the instant case, only the Indian believers do not have the choice of migrating to another region since practice at the San Francisco Peaks is indispensible to their religion.

In holding that government land development could not, as a matter of law, constitute a burden on religious beliefs, the Court of Appeals insisted that prior cases where such a burden has been found all involved some sort of penalty directed toward the believer. However, since First Amendment protection is not confined to mainstream religions (Thomas v. Review Bd., 450 U.S. 717, 714 (1981); "religious beliefs need not be acceptable, logical, consistent, or

comprehensible to others in order to merit First Amendment protection."), it follows that non-mainstream religions must be accommodated according to their particular needs, and not simply to the extent and in the manner that other religions have been found to require protection in prior cases.

There are profound differences between American Indian religions and mainstream religions, which result in correspondingly different needs for accommodation. These differences were explained in the Executive Branch's "American Indian Religious Freedom Act Task Force Report" (hereinafter, Task Force Report), submitted to Congress in August 1979, in response to the Congressional mandate of the American Indian Religious Freedom Act of 1978 (42 U.S.C. § 1996). This act was born out of a Congressional recognition that past federal actions, including land management activities, have

unconstitutionally burdened Indian religious practices, because the government has failed to appreciate the distinctive needs of Indian religions.

As described in the Task Force Report, the mainstream religions are commemorative, in that they trace their origins back to a specific person or event (e.g., Jesus, Buddha, the Exodus). The mainstay of their beliefs is the doctrine that their particular interpretation of reality, usually revealed by the religions founder, is the ultimate truth. Religious institutions were established to carry on the task of interpreting the truth for each generation and of protecting it from heresies. The location at which ceremonies take place is of secondary importance to continuing the tradition of the "laws" of God. Religious institutions have often sought to impose their religious laws on the historical process, oppressing those to whom their laws

are considered foreign or heretical. It is from this commemorative tradition that most current inhabitants of the U.S. come, many early immigrants having come to escape religious oppression. From their bitter experiences came the demand for Constitutional protection against the establishment of religion. (Task Force Report at 8-9.)

The tribal religions, including the American Indian religions, "represent the opposite pole of human experience." (Task Force Report at 10.) They are older than the founded religions and their origins are lost in the mists of time. They do not seek to interpret the ultimate truth, and they have no institutions. Rather, they perpetuate rituals which must be carried out in the particular place and manner as given to the people in the beginning in order to preserve the world and the tribal interests. For them religious freedom means

the ability to maintain their relations with the natural world. (Id. at 10-11.)

Accordingly, while the right of free exercise in the mainstream religions requires permission to follow religious laws without being subject to government penalty, free exercise in the tribal religions requires the preservation of sacred areas in their natural state.

Moreover, to attempt to fractionate sacred areas as did the Court of Appeals, and to say that if the required ceremonies could be performed in an undisturbed portion of the sacred area, practices are not burdened by the destruction of other portions of the area, is a distortion of the tribal view of their religious relationship with the area as a whole. As explained by the testimony of Hopi leader Abbott Sekaquaptewa (quoted by the court below, 708 F.2d at 740-41, fn. 2, set forth,

supra, at 7), the entire area is the home of the gods and source of religious power.[1/]

The court below also apparently reasoned that since lesser intrusions in the past had not caused cessation of religious practices on the Peaks, this provided some empirical evidence that claims to needing the entire Peaks were overstated. However, as this court recognized in Wisconsin v. Yoder, supra, 406 U.S. 205, a religion's ability to tolerate lesser intrusions (in that case public primary education) is not necessarily predictive of its ability to tolerate greater intrusions (in that case, public education at the secondary level).

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1. In the secular context, we would never question whether the "sanctity" of the home had been violated in contravention of the Fourteenth Amendment if only the front bedroom were invaded.

The Court of Appeals announced that since according to the test the court had applied the ski development imposed no burden on the tribal religions, there was no need to examine what governmental interest, if any, it served. The very reason proffered, however, for fashioning such a very restrictive test of burden where government land use is concerned was that the court wanted to "pay due regard to the government's rights and duties in its land." (708 F.2d at 744, fn. 5; emphasis added.) The Court of Appeals maintained that the restrictions it placed on recognizing a burden offered a "resolution of the conflict between the government's property rights and duties of public management, and a plaintiff's constitutional right freely to practice his religion." (708 F.2d at 744.)

As established by this court, however, the test for whether religious practices should be relieved from the burden of

government action requires that first the question of whether the government action creates a burden must be examined, without regard for any governmental interest. Only then, if such a burden is found, is governmental interest in the action taken into account. Moreover, the government interest is then scrutinized to see whether it is of sufficient importance and not otherwise achievable to warrant imposing the burden. (See, e.g., Wisconsin v. Yoder, supra, 416 U.S. at 214; Sherbert v. Verner 374 U.S. 398, 403-409 (1970).)

Under this proper test, government interest is not inserted, as logically it cannot be inserted, to detract from or to deny the existence of a burden.

A special mischief worked by the Court of Appeals' premature "factoring in" of public interest is that it is automatically given weight without examination. In the

opinion supporting California's judgment protecting Indian religious interests, for example, the court found upon examination that several public interests claimed for one land-use project were not even materially served by the projects. (California v. Block, supra, 565 F.Supp. at 595.) Yet, under the test fashioned by the Court of Appeals in the instant case, an assumed government interest would have been given weight without analysis to deny the fact that religious practices were infringed.

The odd results which follow from invoking government "property rights" per se as a factor militating against recognizing a burden, are further illustrated by the Court of Appeals' attempt to harmonize its result in the instant case with the result in Pillar of Fire v. Denver Urban Renewal Authority 509 P.2d 1250 (1973). In the Pillar of Fire case, the Colorado Supreme Court held that a

church alleging a special religious meaning for its first permanent church could show that to condemn the church for an urban renewal project burdened the religion. The court below maintained that the cases were not inconsistent, since "[a] governmental taking of privately-owned religious property . . . involves different considerations than does a claimed First Amendment right to restrict the government's use of its own land." (708 F.2d at 742, fn. 3.) We submit that it may involve different considerations, but the considerations do not go to the issue whether there is a burden.

In attempting to distinguish the Pillar of Fire case from the instant case, the Court of Appeals may have been reflecting a concern that groups could suddenly begin investing government property with purported religious meaning. This is not the case, of course, with American Indian religions whose

religious attachment to sites long predates this government's ownership. And it must be assumed that when this government acquired these religious sites it took them subject to the First Amendment guarantees that they not be managed for purposes inconsistent with the religious beliefs and practices associated with them. Moreover, as this Court demonstrated in Wisconsin v. Yoder, supra, 406 U.S. 205, courts are not unable to distinguish between social fashions and religious traditions. In establishing the religious nature of the Yoder claim, this Court in part relied on the fact that the practice had continued consistently for almost 300 years. (406 U.S. at 219.) The practices associated with the San Francisco Peaks are undoubtedly older.[2]

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2. "The Peaks . . . have for centuries played a central role in the religions of the tribes." (708 F.2d at 738.)

II. The American Indian Religious Freedom Act's Assurance Of Access To Sacred Sites Necessarily Includes Assurance That Their Sacredness Will Not Be Defiled.

The Court of Appeals, although cushioning its holdings in inexactitude, essentially held that the American Indian Religious Freedom Act (AIRFA: 42 U.S.C. § 1996[3/]) assures access to sacred sites on federal land absent a compelling governmental purpose, but that it does not provide similar assurance that the undisturbed naturalness essential to the

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3. The act proclaims the policy "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise "their 'traditional religions, including [inter alia] access to sites . . . .'"

sites' sacredness will be preserved from federal land-use activities.[4/]

The court did find that "AIRFA requires federal agencies . . . to avoid unnecessary interference with . . . traditional Indian religious practices" (708 F.2d at 746; emphasis provided), but it did not discuss what would distinguish "necessary" from "unnecesary" interference, nor how

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4. It agreed with the District Court in finding "that AIRFA requires federal agencies "to refrain from prohibiting access . . . " (508 F.2d at 745-46) and in rejecting plaintiffs' contention that "AIRFA proscribes all federal land uses that conflict or interfere with traditional Indian religious beliefs or practices, unless such uses are justified by compelling governmental interests." (708 F.2d at 745.) At other places, the opinion overstated plaintiffs' contention, e.g., "AIRFA does not, however, declare the protection of Indian religions to be an overriding federal policy, or grant Indian religious practitioners a veto on agency action" (708 F.2d at 746) and quoted from the legislative history denials of more extreme positions, e.g., "it is in no way intended to provide Indian religions with a more favorable status than other religions" (from Senate Report No. 709, at 6, quoted at Id.).

"interference" coincides with or differs from a constitutionally cognizable burden. The Court of Appeals concluded that the Forest Service had complied with the Act in the instant case because the views of Hopi and Navajo religious practitioners "were given due consideration" in the Environmental Impact Statement[5/], and the ski area expansion "will not deny the plaintiffs access to the Peaks . . . ." (708 F.2d at 747). The

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5. The Court of Appeals essentially characterized AIRFA as a procedural statute rather than a Congressional recognition of substantive First Amendment rights, announcing as follows:

> "[A]n agency undertaking a land use project will be in compliance with AIRFA if, in the decision-making process, it obtains and considers the views of Indian leaders, and if, in project implementation, it avoids unnecessary interference with Indian religious practices." (708 F.2d at 747.)

It then pointed to its demonstrated readiness to remand a land-use decision where evidence of Indian religious claims had not been "considered." (Id.)

court summarized, puzzlingly, "The Forest Service has not burdened the plaintiffs' religious practices in any manner prohibited by AIRFA." (Id.; emphasis added.)

It is submitted that the Court of Appeals' interpretation greatly misses the Congressional intent of AIRFA. It must be remembered that AIRFA was born just five years ago out of Congressional recognition that prior failure of government policy to acknowledge the special needs of Indian tribal religions has led to unconstitutional infringement on the practice of those religions. (House Report No. 95-1301, p. 1, reprinted in 1978 U.S. Code Cong. & Ad. News 1262.) Congress reported that the first of three general areas in which interference with the free exercise of native religions has taken place is in denial of access "to certain sites -- a hill, a lake, or a forest glade -- which are sacred to Indian religions.

Ceremonies are often required to be performed in these spots. To deny access to them is analogous to preventing a non-Indian from entering his church or temple." (Id. at 1263.) As we have seen above, the analogy is insufficiently strong, since although a church may generally be rebuilt elsewhere, a sacred site may not be relocated. Nevertheless, it is apparent that Congress recognized access to sacred sites as a constitutionally protected right of American Indian religious practice.

It must also be inferred that Congress understood and intended that assurance of access necessarily comprehends preservation of the conditions essential to the site's sacredness. Three bases support the inference.

First and most importantly, it cannot be assumed that Congress intended to make a mockery by assuring access to sites whose

sacredness has been profaned. Permission to go to a site whose sacredness has been destroyed no more constitutes access to sacred sites than permission to eat adulterated foodstuffs constitutes access to food. Moreover, an interpretation offering hollow assurance is particularly militated against by "the long-standing rule that Legislation affecting the Indians is to be construed in their interest." (Oliphant v. Schlie, 544 F.2d 1007, 1010 (1976), quoting United States v. Nice, 241 U.S. 591, 599 (1916).)

Secondly, the administrative interpretation of the Act, to which courts should defer unless clearly erroneous (see, e.g., Andrus v. Sierra Club, 442 U.S. 347, 358 (1979)) is that access necessarily includes preservation of the natural conditions essential to sacredness. The Task Force Report, supra, which AIRFA required to be prepared with recommendations for the Act's implementation,

states the interpretation categorically:

> "Physical access to the land and its natural products must also include the preservation of the natural conditions which are the sina qua non of that access. (Task Force Report at 54.)

Moreover, the Forest Service, defendant herein, concurred in the Task Force interpretation, reporting as part of the Task Force Report that it had sent an implementing directive to its line management officials at all levels. Management officials were directed that native traditional religious leaders must be invited to provide input at the preparatory stage of land management planning. Critically, they were further directed as follows: "When examination and consultation determine a need to protect or preserve certain lands or sites, this will be accomplished in and through the land management plan." (May 10, 1979, letter to

Assistant Secretary of Interior Forrest J. Gerard from Deputy Chief Forester Jerome A. Miles, in unpaginated Appendix of Task Force Report; emphasis added.) Clearly, the administrative interpretation of the Act is that it requires preservation of sacred lands and sites.

Thirdly, in enacting the AIRFA provision for access to sacred sites, the Congress looked to a California statute as precedent for such protection, saying "[t]he State of California has enacted the Native American Historical, Cultural, and Sacred Sites Act of 1976, which takes giant strides in overcoming the problems of access." (House Report, supra in 1978 U.S. Code Cong. & Ad. News 1262, 1264-65; emphasis added.) Importantly, this California statute expressly includes protection of sacred sites from damage, providing as follows:

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> "No public agency, and no private party [using public property] shall in any manner whatsoever interfere with the free expression or exercise of Native American religion as provided in the United States Constitution and the California Constitution; nor shall any such agency or party cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require." (Cal. Pub. Res. Code, § 5097.9.)

It must be assumed that Congress intended to model the protection provided by AIRFA after that provided by the California statute and, therefore, to protect sacred sites from damage.

CONCLUSION

Both the First Amendment and AIRFA protect American Indian religions from the burden on their religious practices inflicted by the expansion of ski facilities on San Francisco Peaks, the indispensible place of worship to

the Navajo and Hopi traditional religions.

For the foregoing reasons, the petition for certiorari should be granted and the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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